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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Implementation of the Cable)	
Television Consumer Protection)	CS Docket No. 97-248
and Competition Act of 1992)	
)	
Petition for Rulemaking of)	
Ameritech New Media, Inc.)	RM No. 9097
Regarding Development of)	
Competition and Diversity in)	
Video Programming Distribution)	
and Carriage)	

REPLY COMMENTS OF LIBERTY MEDIA CORPORATION

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REPLY COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") hereby files its reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. COMMENTERS PROPOSING THE EXPANSION OF THE DISCOVERY PROCESS OR THE ADOPTION OF A DAMAGES REMEDY OFFER NO EVIDENCE JUSTIFYING THE NEED FOR SUCH RULE CHANGES.

While certain commenters describe how they would significantly broaden and complicate the Commission's program access rules by expanding discovery procedures and adding a new damages remedy,

¹ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CS Docket No. 97-248, FCC 97-415 (rel. Dec. 18, 1997) ("Notice").

they fail to offer any factual justification for such proposed changes. In fact, these commenters advance little more than unsupported "wish lists" through which they hope to gain an unjustified handicap in their negotiations with programmers. For example, among other things, they ask for:

- unfettered access to all contracts of the defendant programmer, regardless of the relevance of any given contract to the particular complaint at issue;²
- mandatory pre-complaint access to a programmer's confidential pricing and other contract information;³
- damages calculations that go beyond the scope of the Notice and arguably beyond the bounds of legitimate advocacy;⁴ and
- damages formulations that would require losing programmers, on a going-forward basis, to implement a discriminatory rate in favor of the winning MVPD as against all other MVPDs.⁵

² See Comments of Ameritech New Media at 15 (asking the Commission to require defendants to produce all contracts (and all associated term sheets and correspondence) between the defendant programmer and all competing MVPDs in all Designated Market Areas the complainant serves or reasonably expects to serve).

³ See Comments of Small Cable Business Association at 10-13.

⁴ See, e.g., Comments of RCN Telecom Services at 11 (proposing that damages should be tied to a "defendant-specific" indicator, such as percentage of revenue, so that cable operators are penalized in an amount proportionate to their net worth). For a similarly absurd penalty proposal, see Comments of Consumers Union, et al. at 12 (proposing to apply the maximum forfeitures remedy to each franchise area in which an MSO operates).

⁵ See Comments of Small Cable Business Association at 14 (arguing that losing programmers should be required to provide their programming to the complainant for a 2-year period at a significantly lower rate than that given to other MVPDs).

As Liberty Media and other commenters demonstrated in their initial comments, there are simply no facts or evidence to support any changes to the discovery or remedy aspects of the program access rules, let alone adoption of such draconian proposals. The facts surrounding the existing program access complaints make clear that a damages remedy is simply unnecessary. To date, the Commission has not even needed to use its existing forfeitures remedy in any program access case, so it is hard to understand how damages, a remedy that is not even mentioned in the Act, could somehow be "necessary." Equally important, an insignificant number of program access complaints have been filed (38), and nearly half of such cases (18) have been settled by the parties.⁶ Thus, the evidence demonstrates that even without the extraordinary remedy of damages, the threat of the existing sanctions is sufficient to deter violations and to induce private resolution of disputes.⁷

⁶ See Comments of Liberty Media at Exhibit B.

⁷ See Comments of Cablevision at 27-28; Comments of Comcast at 7; Comments of Encore at 10; Comments of HBO at 18-20; Comments of NCTA at 11-12; Comments of Time Warner at 6.

Moreover, no commenter offered a defensible basis for Commission jurisdiction to adopt a damages remedy. Most commenters simply relied on the Section 628(e) analysis set forth in the Commission's Reconsideration Order, which, as Liberty Media demonstrated, is unsustainable. See Comments of Liberty Media at 18-24. Ameritech suggests that Section 4(i) of the Act empowers the Commission to expand the program access remedies to include damages. See Comments of Ameritech New Media at 19. However, because Section 4(i) requires that Commission action be "necessary in the execution of its functions" (emphasis added), Section 4(i) cannot be cited as a residual source of authority in this case since, as shown above and in Liberty Media's initial comments, damages are decidedly not necessary here.

Arguments for expanding the current discovery rules are equally unsupported. Commenters contend that expanded discovery is required to afford them access to critical documents that are solely in the hands of the defendants.⁸ However, none of these commenters has shown that the current Commission-controlled discovery procedures are inadequate to afford access to requested documents. In fact, the record indicates that the Commission has needed to use discovery in only two of the 38 complaints filed to date, and Liberty Media is unaware of any instance in which the Commission has denied a complainant's reasonable request for discovery under the existing rules. The record reveals no deficiency or unfairness in the current discovery practices and policies, and, thus, no reason for change. Rather, it demonstrates that the current system of "Commission-controlled discovery has worked adequately . . . and will continue to serve the public interest best."⁹

The foregoing conclusions are especially true given that the Commission has previously addressed the possible adoption of a damages remedy and the expansion of the discovery rules and determined that there is no evidence justifying Commission action.¹⁰ The factual record reaffirms that these prior Commission

⁸ See, e.g., Comments of Ameritech New Media at 14; Comments of DirecTV at 25-26; Comments of EchoStar at 3-4; Comments of GTE at 9-10; Comments of NRTC at 15; Comments of Wireless Cable Association at 8.

⁹ Notice at ¶ 44.

¹⁰ See Comments of Liberty Media at 5-6, 16-17.

determinations were correct then and continue to be correct today. Were the Commission to adopt the proposed expansions of the rules on this record (particularly in light of the Commission's prior determinations), it would be acting contrary to well-established judicial precedent to avoid rule changes unsupported by substantial record evidence.¹¹

Finally, not only are damages and broadened discovery unnecessary, they would increase the cost, complexity, and duration of program access cases, with no corresponding public interest benefit.¹² Expanded discovery would also compromise the confidential terms of the programmer-MVPD relationship, thereby significantly impairing the negotiations process,¹³ and would encourage the filing of additional program access complaints merely to extract otherwise unjustified concessions from programmers. None of the parties advocating these changes acknowledge these legitimate concerns or in any way attempt to explain how they can be ameliorated. Liberty Media respectfully submits that these

¹¹ See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983) (an agency acts arbitrarily and capriciously if it "offer[s] an explanation for its decision that runs counter to the evidence before the agency."); Association of Public-Safety Communications Officials-International, Inc. v. FCC, 76 F.3d 395, 398 (D.C. Cir. 1996) (the FCC must demonstrate "that it has based its decision on a reasoned analysis supported by the evidence before the Commission.").

¹² See, e.g., Comments of Liberty Media at 8-10 (discovery), 17-18 (damages); Comments of Comcast at 5-6.

¹³ See e.g., Comments of Cablevision at 26; Comments of HBO at 10-12; Comments of Liberty Media at 10-13; Comments of NCTA at 7-8; Comments of Time Warner at 4-5.

undesirable consequences, when combined with the complete lack of a factual predicate for the proposed expansion of the discovery and remedy provisions of the program access rules, require the Commission to reject these proposals.

II. THE COMMISSION SHOULD REJECT PROPOSALS TO EXTEND THE PROGRAM ACCESS RULES TO SERVICES THAT HAVE NEVER BEEN DISTRIBUTED VIA SATELLITE.

A few commenters suggest that Section 628 applies even to services that have never been distributed via satellite.¹⁴ This suggestion, however, is squarely at odds with the plain meaning, legislative history, and policy objectives of Section 628.

As Liberty Media demonstrated in its initial comments, the language of Section 628 is unambiguous in its jurisdictional focus on satellite-delivered programming services and cannot be read to confer jurisdiction over non-satellite programming. Throughout Section 628, Congress never once failed to use the complete phrase "satellite cable programming" or "satellite broadcast programming" when conferring authority on the Commission and when describing what conduct was to be prohibited.¹⁵ Because the language of

¹⁴ See e.g., Comments of Bell Atlantic at 11; Comments of BellSouth at 25-26; Comments of Consumers Union, et al. at 7; Comments of DirecTV at 21-22; Comments of EchoStar at 13; Comments of GE/Americom at 3-4; Comments of SNET at 5.

¹⁵ As Liberty Media also pointed out, the fact that Congress limited the scope of Section 628 to include only satellite-delivered programming was not inadvertent. At the time of the 1992 Cable Act, Congress was well aware of terrestrial programming delivery systems. Microwave and fiber optic distribution of video signals had been in existence for decades. In fact, Congress was aware that several of the most popular cable programming services, (continued ...)

Section 628 is unambiguous in its narrow jurisdictional focus on satellite-delivered programming, it may not be read to confer jurisdiction over services that have always been distributed via non-satellite means.¹⁶

This conclusion is supported by the legislative history of Section 628. As NCTA correctly noted, Congress indicated its intent to limit the program access requirements only to satellite-delivered services by rejecting the Senate version of Section 628 which, unlike the satellite-specific House version ultimately adopted by Congress, would have extended the program access prohibitions to all vertically integrated national and regional programmers, regardless of how they were distributed.¹⁷

(... continued)

such as HBO and WTBS, initially used terrestrial distribution methods. See Comments of Liberty Media at 26, n. 51.

¹⁶ See Comments of Liberty Media at 26 (citing, among other things, Railway Labor Exec. Ass'n v. National Mediation Board, 29 F.3d 655 (D.C. Cir. 1994) (en banc), cert. denied, 514 U.S. 1032 (1995) (rejecting National Mediation Board's argument that because the statute did not expressly forbid the Board from asserting jurisdiction over a representation dispute in circumstances other than those enumerated in the statute, it should not be prohibited from doing so); In re Johnson and McLemore v. Liberty State Bank, 39 Bankr. Rpt. 478, 481 (Bank. Ct. M.D. Tenn. 1984) ("A statute ... should not be extended or enlarged by implication so as to embrace matters not specifically covered."); Water Transport Ass'n et al. v. ICC et al., 722 F.2d 1025 (2d Cir. 1983) (refusing to expand statutory provision on standing to encompass "water carriers" where express language of Act conferred standing on limited class, namely "shippers and ports"))).

¹⁷ See Comments of NCTA at 13-17. "Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." 369 Norman J. Singer, Sutherland Stat. Const. § 48.18 (5th ed. 1992). See also Tahoe Regional Planning Agency v. McKay, 769 F.2d 534, 538 (9th Cir. 1985) (same).

Finally, Congress' decision to limit the program access provisions to satellite services was consistent with Congress' desire to promote the development of local programming.¹⁸ If Congress had written Section 628 to encompass all terrestrially-distributed services, the impact on locally originated services would have been particularly harsh. As Liberty Media noted, local services are terrestrially distributed and have fundamentally different economics than nationally-distributed services.¹⁹ Imposing program access regulations on local services would reduce the value of the services to producers. This, in turn, would reduce the incentive to create local services. Commenters urging the Commission to extend Section 628 to all terrestrially-distributed services ignore Congress' policy objective to promote local services and the fact that this objective would be undermined were the Commission to adopt their proposed extension of the rules.

III. IF THE COMMISSION ADOPTS TIME DEADLINES FOR RESOLVING PROGRAM ACCESS CASES, SUCH DEADLINES SHOULD RUN FROM THE CLOSE OF THE PLEADING CYCLE, AND THE PLEADING CYCLE SHOULD REMAIN 30 DAYS FOR ANSWER AND 20 DAYS FOR REPLY.

Liberty Media agrees with those commenters who point out that the imposition of time deadlines for resolving program access cases could benefit both programmers and complainants by providing increased certainty and quicker relief.²⁰ However, the Commission

¹⁸ See Comments of Liberty Media at 27-29.

¹⁹ Id. at 28-29.

²⁰ See, e.g., Comments of DirectTV at 24-25; Comments of GTE at 7-8; Comments of HBO at 4; Comments of NRTC at 14.

must carefully balance the desire to resolve complaints quickly with the complexity of program access cases. Thus, any deadlines imposed should be presumptive only, and the Commission should create a mechanism that allows for the extension of a specified deadline in particularly complex cases.²¹

Moreover, Liberty Media strongly agrees with those commenters who oppose any shortening of the pleading cycle.²² Without sufficient time to investigate a complaint, marshal evidence, and hone arguments, parties may be left with inaccurate or incomplete pleadings which will merely make the program access complaint process less efficient.²³ The shortening of the pleading cycle is particularly unjustified given that even under the existing pleading deadlines, the Commission has received, and has granted, requests for extensions of time to file program access answers and replies in 63% of the cases filed to date.²⁴ The existing pleading cycle is thus often insufficient to begin with and, therefore, reduction of that cycle certainly is not appropriate.

Finally, any time deadlines which the Commission may adopt for the resolution of program access cases should run from the close of

²¹ See, e.g., Comments of Liberty Media at 29-31; Comments of Encore at 4.

²² See, e.g., Comments of Cablevision at 25; Comments of Comcast at 4-5; Comments of Encore at 4; Comments of HBO at 4-6; Comments of NCTA at 5-7; Comments of Time Warner Cable at 4-5.

²³ See Comments of Comcast Corporation at 4-5; Comments of NCTA at 7.

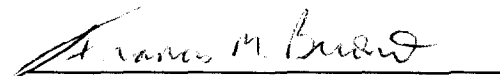
²⁴ See Comments of Liberty Media at 32 and Exhibit B.

the pleading cycle (including any extensions granted by the Commission). As the Wireless Cable Association correctly points out, "[r]unning the case resolution deadline from the filing of the complaint [] may not give the staff sufficient time to review the record."²⁵ Beginning the calculation of the time resolution deadline from the close of the pleading cycle would also motivate parties to include in their pleadings all of the arguments and information needed to accurately describe their side of the case and thereby help to expedite a Commission decision.

IV. CONCLUSION

Liberty Media respectfully urges the Commission to adopt an order in this proceeding consistent with the comments herein and in Liberty Media's initial comments.

Respectfully submitted,



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²⁵ Comments of Wireless Cable Association at 14.